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**IN THE
COURT OF APPEALS OF INDIANA**

DEATRON LEE,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 02A03-0608-PC-379
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-9707-CF-431

January 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Deatron Lee (“Lee”) appeals the denial of his petition for post-conviction relief challenging his sentence for Murder.¹ We affirm.

Issues

Lee raises three issues for review. We address the issues that are not procedurally defaulted: whether he was denied the effective assistance of trial or appellate counsel.²

Facts and Procedural History

On direct appeal, the Indiana Supreme Court recited the pertinent facts as follows:

On July 7, 1997, at around 10 p.m., appellant Deatron Lee and his friend Allen Bates went to a private residence in Fort Wayne. Bates had with him a handgun that he customarily carried. About a hundred people were partying and drinking beer in the house and yard. Lee and Bates socialized for a few hours.

As the evening progressed, some partygoers began throwing beer, and others attempted to eject them. A fight broke out, and Bates protested that Jason Wallace had “sucker punched” another partygoer with a blow to the back of the head. (R. at 450.) Wallace overheard Bates describing this act as “weak,” and Wallace and Bates began fighting. (R. at 450-52.) Bates, during a pause in the action, handed his gun to Lee to hold while Bates was brawling.

¹ Ind. Code § 35-42-1-1.

² We do not address Lee’s freestanding claim of sentencing error, i.e., that the trial court failed to find appropriate mitigators and provide an adequate sentencing statement, articulating its findings with respect to mitigators and aggravators. The issue was available to Lee on direct appeal, but was not raised. If an issue was known and available but not raised on direct appeal, it is waived. Rouster v. State, 705 N.E.2d 999, 1003 (Ind. 1999). If it was raised on appeal, but decided adversely, it is res judicata. Id. If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding. Woods v. State, 701 N.E.2d 1208, 1215 (Ind. 1998), cert. denied, 528 U.S. 861 (1999). A claim of ineffective assistance of appellate counsel is also an appropriate issue for post-conviction review. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). However, most freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata. Id. Generally, complaints that something went awry at trial are cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

Several others joined in the fight on Wallace's behalf. Lee also became engaged in the scuffle. Lee and Bates were outnumbered, and Lee brandished Bates' gun, ordering everyone to "hold up" and/or "chill out" and declared, "I ain't playing." (R. at 457, 535.) As Lee made this statement, Wallace was standing close by Bates and Lee, facing the duo. Lee then shot Wallace in the chest. After Wallace fell, Bates kicked him. Wallace died a few days later from the gunshot wound.

Lee and Bates fled. When police officers questioned Lee three or four hours after the shooting, Lee claimed that he left the party before the shooting occurred.

A jury found Lee guilty of murder. The trial court sentenced him to fifty-five years in prison.

Lee v. State, 735 N.E.2d 1112, 1113 (Ind. 2000). On appeal, Lee alleged that juror bias denied him a fair trial. His conviction was affirmed. See id.

On September 11, 2001, Lee filed a petition for post-conviction relief. He filed an amended petition on July 25, 2005, alleging sentencing error, ineffectiveness of trial counsel, and ineffectiveness of appellate counsel. On February 17, 2006, the post-conviction court held an evidentiary hearing on the allegations. On June 29, 2006, the post-conviction court entered findings of fact, conclusions of law and an order denying Lee's petition. He now appeals the denial of post-conviction relief.

Discussion and Decision

A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). Post-conviction

proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

B. Effectiveness of Trial Counsel

Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent

inquiries. Strickland, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

Moreover, under the Strickland test, counsel’s performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Lee contends that his trial counsel was ineffective for failing to emphasize the nature and circumstances of the crime in arguing for a sentence less than the presumptive. He acknowledges that counsel argued for a sentence of forty-five years, noting Lee’s lack of significant criminal history and his employment. However, he claims that, at the sentencing hearing, counsel should have abandoned the defense theory of misidentification, admit that Lee was the shooter, and argue that he was defending his friend.

Trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Bald assertions of counsel’s omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

The record indicates that Lee’s counsel argued for a minimal sentence, citing Lee’s lack of criminal history, employment and good standing in the community. He presented character witnesses on Lee’s behalf. He did not emphasize the nature and circumstances of

the crime, including the fact that Lee's friend was apparently outnumbered and in need of aid. However, the nature and circumstances of the crime did not necessarily militate toward a lesser sentence. Although Lee and his friend were outnumbered in a fistfight, the others were not armed. Lee took possession of his friend's weapon and shot an unarmed man.

Counsel's efforts and strategies, although they did not ultimately achieve the result desired by Lee, were not so unreasonable as to constitute ineffective assistance of counsel. See Badelle v. State, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001), trans. denied (deciding in relevant part that, when trial counsel's efforts were "more than adequate" to support a defense of mistaken identity, counsel's decision not to call or seek out additional witnesses was a judgment call within the wide range of reasonable assistance).

C. Effectiveness of Appellate Counsel

Finally, Lee contends that his appellate counsel was ineffective for failing to allege the inadequacy of the sentencing statement or to challenge the fifty-five year sentence as manifestly unreasonable.

A defendant is entitled to the effective assistance of appellate counsel. Stevens, 770 N.E.2d at 760. Appellate ineffectiveness claims are evaluated under the standard of Strickland, 466 U.S. at 668. To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

Appellate courts should be particularly deferential to an appellate counsel's strategic

decision to include or exclude issues, unless the decision was “unquestionably unreasonable.” Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998). To prevail on his claim of ineffective assistance of appellate counsel, Lee must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens, 770 N.E.2d at 760. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. Id. Even if counsel’s choice is not reasonable, to prevail, the petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

At the time of Lee’s direct appeal, a sentence would be revised upon appeal only if it was manifestly unreasonable in light of the nature of the offense and the character of the offender. See Carter v. State, 711 N.E.2d 835, 841 (Ind. 1999). A claim that a sentence was manifestly unreasonable required the appellate court to reexamine the valid aggravating and mitigating circumstances. Id. The reviewing court did not decide whether the sentence was unreasonable but, rather, whether the sentence was “clearly, plainly, and obviously” so. Bonds v. State, 721 N.E.2d 1238, 1243 (Ind. 1999). Nevertheless, when a trial court imposed the presumptive sentence, the appellate court presumed that the trial court considered the proper factors in making its sentencing determination. Jones v. State, 698 N.E.2d 289, 291 (Ind. 1998).

Here, Lee received the presumptive sentence for murder. Because the trial court imposed the presumptive sentence, it was not required to set forth the specific reasons for

that sentence. See Williams v. State, 676 N.E.2d 1074, 1078 (Ind. Ct. App. 1997). Furthermore, had appellate counsel argued that additional mitigating factors existed, a revision of the sentence as manifestly unreasonable would be unlikely in light of the deference given to the trial courts' sentencing decisions. For example, in Jackson v. State, 752 N.E.2d 45, 47 (Ind. 2001), the Indiana Supreme Court affirmed a presumptive sentence for murder where the trial court had identified six mitigating circumstances and a single "aggravating" circumstance ("reduction below the presumptive would depreciate the seriousness of the crime," i.e., a consideration available when the trial court contemplated reducing a sentence from the presumptive). Lee is unable to show a reasonable probability of a different outcome had appellate counsel challenged his sentence as manifestly unreasonable.

Conclusion

Lee has failed to demonstrate that trial or appellate counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in rejecting Lee's ineffective assistance claims and denying post-conviction relief.

Affirmed.

VAIDIK, J., and BARNES, J., concur.